

EXHIBIT 1



Administrator's Decision on Contributor Appeal

By Certified Mail

October 18, 2011

Mr. W. Scott McCollough
General Counsel
UTEX Communications Corp
1250 S Capital of Texas Hwy; Bldg 2-235
West Lake Hills, TX 78746

Re: UTEX Communications Corp d/b/a/ FeatureGroup IP (Filer ID 825102)
Letter of Appeal dated April 27, 2011 regarding Rejection of 2009 FCC Form
499-A

Dear Mr. McCollough:

In response to your letter of appeal dated April 27, 2011, and pursuant to the July 5, 2011 Agreed Order approved by the United States Bankruptcy Court for the Western District of Texas,¹ the Universal Service Administrative Company (USAC) has completed its evaluation of the appeal you sent on behalf of UTEX Communications Corp. d/b/a FeatureGroup IP (UTEX).² As stated in the *Order*, UTEX's exhaustion of administrative remedies within USAC, the FCC and, if necessary the U.S. Courts of Appeal, shall be the sole means by which UTEX's universal service obligations and rights are quantified.³ As discussed in greater detail below, USAC hereby denies in part, grants in part and dismisses as moot in part the appeal.

Decision on Appeal: Granted in part, denied in part and dismissed as moot in part.

USAC has determined that its initial rejection of UTEX's 2009 revised FCC Form 499-A was proper, but that the supporting documentation provided by UTEX after receipt of, and in response to, USAC's rejection of the revised form demonstrates that it is reasonable for UTEX to conclude that its revenues should be reported as carrier's carrier

¹ *Agreed Order Adopting Stipulation Concerning USAC Motion for Relief from Automatic Stay*, No. 10-10599-cag, at 3 (Bankr. W.D. Tex. July 5, 2011) ("It is further ordered that, to the extent necessary, the stay is hereby lifted from and after the date of this Order so as to allow USAC (or a division of USAC or the Administrator) to proceed forward and respond to the Debtor's letter of April 27, 2011 and issue a decision regarding UTEX's USF-related obligation for calendar year 2008, in connection with the 2009 Annual True-Up.") (*Order*).

² Letter from W. Scott McCollough, General Counsel, UTEX, to Mike Lawrence, USAC Collections Manager (Apr. 27, 2011) (*Appeal*).

³ *Order* at 3.

on its revised 2009 FCC Form 499-A. Therefore, USAC grants this portion of UTEX's appeal. USAC has also determined that UTEX is not entitled to a refund of federal universal service support mechanism amounts contributed in years prior to the 2009 FCC Form 499-A at issue in this appeal. Therefore, USAC denies this portion of UTEX's appeal. USAC has further determined that there remains a discrepancy between the federal universal service contribution costs recovered by UTEX from its customers as reported on its revised 2009 FCC Form 499-A and the lack of other universal service assessable revenue on the form. USAC addresses this discrepancy in greater detail below. Regarding the pass-through amounts UTEX states it will be charged by its underlying carriers, USAC concludes that the FCC's reseller certification procedure already addresses this issue. Therefore, USAC dismisses as moot this portion of UTEX's appeal.

USAC's Rejection of UTEX's Revised FCC Form 499-A

With very limited exceptions, all telecommunications carriers are required to file an FCC Form 499-A.⁴ The Form 499-A sets forth information that a telecommunications carrier must provide on an annual basis.⁵ Each Form 499-A submitted by a carrier must be signed by an executive officer, must certify as to the truth and accuracy of the historical data included on the form, and must certify that any projections included on the form represent a good-faith estimate based on the carrier's policies and procedures.⁶ As the administrator of the universal service support mechanisms,⁷ USAC is authorized to verify the information contained in a carrier's Form 499-A and, upon request, carriers must provide USAC with records and documentation to justify the information reported on the form, including any methodology used to determine projections.⁸ Pursuant to FCC rule 54.712, carriers may recover their federal universal service contribution costs.⁹ They may only do so, however, through interstate telecommunications-related charges to their end-user customers.¹⁰

On March 31, 2009, UTEX filed its original 2009 FCC Form 499-A, reporting a gross universal service contribution base amount of \$1,212,847 in Block 4 of the form, of which \$1,203,352 was assessable interstate revenue subject to federal universal service contribution obligations. On this form:

- \$119,594 was reported on Line 403 as revenues from "[s]urcharges or other amounts on bills identified as recovering State or Federal universal service contributions" (\$119,594 was reported as interstate/federal universal service contribution costs recovered from customers);¹¹

⁴ 47 C.F.R. § 54.706.

⁵ 47 C.F.R. § 54.711(a).

⁶ *Id.*

⁷ 47 C.F.R. § 54.701(a).

⁸ 47 C.F.R. § 54.711(a).

⁹ 47 C.F.R. § 54.712.

¹⁰ *Id.*

¹¹ Telecommunications Reporting Worksheet, FCC Form 499-A, at 5 (2009).

- \$1,093,253 was reported on Line 406 as revenues from “[l]ocal private line & special access service” (\$1,083,758 as interstate revenues);¹² and
- \$96,644 was reported on Line 418.3 as revenues from “[r]evenues other than U.S. telecommunications revenues.”¹³

Block 3 of the form reported \$205,215 of carrier’s carrier revenue that was not subject to federal universal support contribution obligations. The revenue reported was consistent with UTEX’s prior FCC Form 499-A filings, as well as revenue amounts forecasted on UTEX’s prior year’s FCC Form 499-Q filings.

On July 6, 2009, UTEX filed a revised 2009 FCC Form 499-A reporting a significantly reduced gross universal service contribution base amount of \$129,089 in Block 4 of the form, of which \$119,594 was assessable interstate revenue subject to federal universal service contribution obligations. On this form:

- \$119,594 was reported on Line 403 as revenues from “[s]urcharges or other amounts on bills identified as recovering State or Federal universal service contributions” (\$119,594 was reported as interstate/federal universal service contribution costs recovered from customers);¹⁴
- \$9,495 was reported on Line 406 as revenues from “[l]ocal private line & special access service” (\$0 as interstate revenues);¹⁵ and
- \$106,644 was reported on Line 418.3 as revenues from “[r]evenues other than U.S. telecommunications revenues.”¹⁶

Block 3 of the form reported a significant increase in carrier’s carrier revenue, from \$205,215 as reported on the original 2009 FCC Form 499-A to \$1,276,973 as reported on the revised form, that was not subject to federal universal service obligations. This was not consistent with UTEX’s prior FCC Form 499-A filings, nor its prior year’s FCC Form 499-Q filings. UTEX’s revised 2009 FCC Form 499-A filing also contained a reporting inconsistency. Namely, it reported on Line 403 that UTEX had recovered \$119,594 in federal universal service contribution costs from its customers, but reported \$0 in any other assessable end-user interstate universal service revenues.

USAC contacted UTEX to question the accuracy of the revenue information reported on the revised 2009 FCC Form 499-A because of: (i) the significant shift in assessable Block 4 federal universal service revenue to non-assessable Block 3 carrier’s carrier revenue on the revised 2009 FCC Form 499-A; (ii) the revenue reported on UTEX’s revised form was inconsistent with how UTEX had reported its revenue on prior filings; and (iii) the discrepancy between the federal universal service contribution costs recovered by UTEX from its customers and its \$0 of any other reported interstate end-user revenue. On April 8, 2011, after waiting more than 18 months for an explanation of

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

the revenue reported by UTEX on its revised 2009 FCC Form 499-A, USAC rejected the revised form. USAC's rejection of UTEX's revised 2009 FCC Form 499-A was due to the unexplained substantial shift in UTEX's revenue reporting and the discrepancy between the federal universal service contribution costs it had recovered from its customers and its \$0 of any other reported end-user interstate universal service revenue. Contrary to UTEX's assertion in the April 27, 2011 letter, USAC did not classify or re-classify UTEX's revenues in any way. Rather, USAC rejected UTEX's revised 2009 FCC Form 499-A and reinstated UTEX's original 2009 FCC Form 499-A filing, which had been certified as truthful and accurate by a company officer on March 31, 2009.

After reinstating UTEX's original 2009 FCC Form 499-A, USAC recalculated UTEX's 2009 Annual/Quarterly (A/Q) True-up. Based on the revenue reported by UTEX on its original 2009 FCC Form 499-A, USAC determined that instead of UTEX receiving a credit of \$104,023.11, as calculated based on UTEX's revised 2009 FCC Form 499-A, UTEX owed an additional \$816.91 in universal service contribution obligations for the 2008 calendar year. This resulted in USAC reversing the \$104,023.11 in credits that were issued based on UTEX's revised 2009 FCC Form 499-A and invoicing UTEX for the additional \$816.91 in universal service contribution obligations owed in three installments over the second quarter of 2011. Because the 2009 A/Q True-up reconciled UTEX's projected 2008 revenue as reported on its quarterly FCC Form 499-Qs against its actual 2008 revenue as reported on its original 2009 FCC Form 499-A, and because the original form reported a greater amount of total assessable federal universal service contribution revenue in Block 4 than did the revised form, all of the billing adjustments were applied to the bankruptcy pre-petition period, reducing UTEX's pre-petition credit amount from \$131,995.57 to \$27,155.55.¹⁷

It was not until after USAC sent its April 8, 2011 letter to UTEX informing the company of the steps it had taken, and planned to take, with respect to the revised 2009 FCC Form 499-A that USAC received the April 27, 2011 appeal from UTEX explaining the revenue shift.

UTEX's Revenue Classifications

Although USAC's initial rejection of the revised 2009 FCC Form 499-A was proper, based on information provided by UTEX after the rejection of its revised form and the supporting documentation referenced in its appeal,¹⁸ USAC acknowledges that UTEX could reasonably conclude that its 2008 revenues, as reported on its revised 2009 FCC Form 499-A, are Block 3 carrier's carrier, not Block 4 end-user, revenues. UTEX states in its appeal that it reclassified its telecommunication revenues to Block 3 as carrier's

¹⁷ As explained in USAC's April 8, 2011 letter, UTEX filed for Chapter 11 bankruptcy protection on March 31, 2010, making 100% of its true-up credits pre-petition.

¹⁸ As supporting documentation for the revenues reported as carrier's carrier on its revised 2009 FCC Form 499-A, UTEX provided USAC with a copy of a Texas Public Utilities Commission (Texas PUC) arbitration award and referenced a list of UTEX customers found in Schedule B2 "OCN Billing Detail" of the bankruptcy schedules.

carrier revenues based on a Texas PUC arbitration award in which UTEX's "service was functionally deemed to not to be telephone exchange service, but instead, [an] exchange access service."¹⁹ The arbitrator rejected UTEX's contentions that its traffic was enhanced/information service traffic from UTEX's enhanced service provider (ESP) end-user customers. Instead, the arbitrator found that "most, if not all" of UTEX's traffic originated on the PSTN, was "'IP-in-the-Middle'" traffic and was, therefore, "'telephone toll service' handled by a group of carriers."²⁰

In the arbitration proceeding, UTEX stated that it provides a "telephone exchange service (or an information access-like service)" for ESPs,²¹ where its "customer is responsible for all transport to and from the LATA where the service is provided."²² As explained in the 2009 FCC Form 499-A instructions, revenue from other carriers for the origination or termination of toll or non-toll traffic should be reported in Block 3 as carrier's carrier revenue.²³ Additionally, after review of UTEX's customer list, USAC was able to determine that over 96% of the revenue reported on UTEX's revised 2009 FCC Form 499-A came from other carriers that filed the Form 499-A. Therefore, because UTEX could reasonably conclude that the traffic it was terminating for other carriers should be reported on Block 3 of its revised 2009 FCC Form 499-A as carrier's carrier revenue and because USAC was able to independently confirm that the majority of the customers identified on UTEX's customer list had themselves filed the Form 499-A, USAC grants this portion of UTEX's appeal. As a result, USAC will reinstate UTEX's revised 2009 FCC Form 499-A and will reverse the federal universal service contribution amounts associated with the original 2009 FCC Form 499-A. USAC also will recalculate UTEX's 2009 FCC Form 499 A/Q true-up based on UTEX's revised revenue information and adjust UTEX's prepetition amount accordingly.

Because the late payment penalties assessed on UTEX's September 2010 through April 2011 and June 2011 through August 2011 invoices post-date the March 3, 2010 bankruptcy filing date, they are entirely the result of UTEX's failure to make timely payments towards its post-petition universal service contribution obligations and USAC will not reverse those penalties.²⁴ Therefore, USAC denies this portion of UTEX's appeal.

¹⁹ See *Appeal* at 3; *UTEX Commc'ns Corp. v. AT&T Texas, Pub. Util. Comm'n of Texas*, Docket No. 33323, Arbitration Award, at 57 (2009) (*Award*).

²⁰ *Id.*

²¹ *Award* at 54.

²² *Award* at 101.

²³ Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 25-26 (2009) (*Instructions*).

²⁴ The FCC in its *Comprehensive Review Order*, directed USAC to assess late fees on all unpaid balances. *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration and Oversight*, WC Docket No. 05-195 et al., Report and Order, FCC 07-150, 22 FCC Rcd 16372, 16380-81, 14, 16 (2007). Failure to pay universal service contribution amounts when due will result in late charges being assessed on the amount outstanding. 47 C.F.R. § 54.713(b).

The FCC-Mandated One-Year Filing Deadline

With regard to UTEX's FCC Form 499-A filings prior to its revised 2009 FCC Form 499-A filing, USAC is prohibited from accepting a downward revision of an FCC Form 499-A after the FCC-mandated one-year deadline.²⁵ The onus was on UTEX to know if and how its revenues should have been reported on the Forms 499 and to timely file its revisions in accordance with FCC requirements.²⁶ UTEX is not entitled to a refund of universal service support mechanism amounts contributed in prior years. Therefore, USAC denies this portion of UTEX's appeal.

UTEX's Federal Universal Service Contribution Cost Recovery

There remains a discrepancy with respect to the universal service contribution costs recovered by UTEX from its customers as reported on UTEX's revised 2009 FCC Form 499-A that must be addressed once the form is reinstated. Namely, once USAC reinstates the revised 2009 FCC Form 499-A, UTEX will have recovered from its customers universal service contribution costs based on Block 3 carrier's carrier revenue that is exempt from the federal universal service contribution requirements (i.e., contribution costs that it is not entitled to recover because these revenues are not interstate end-user revenues subject to federal universal service contribution obligations). UTEX confirms in its appeal that it has recovered its 2008 calendar year federal universal service contribution costs from its customers, stating that the "amount reported on the revised form is exactly the amount of pass-through revenue [UTEX] actually received." Consistent with the Commission's *Clear World Order*, carriers must reimburse their customers in full for any excess contribution costs collected.²⁷ Therefore, UTEX must refund these amounts to its customers. Please note that although such a refund to customers would normally prompt a downward adjustment to Line 403 of the form, because the one-year deadline for a downward revision to the 2009 FCC Form 499-A has expired, UTEX may not reflect the effect of these refunds to customers on a revised 2009

²⁵ See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, CC Docket 96-45, Order, DA 04-3669, 20 FCC Rcd 1012, 1016, ¶ 10 (2004) ("[A]ny revised 499-A that would result in decreased contributions must be submitted by March 31 of the year after the original filing due date."). The FCC has stated that "[a] strict one-year deadline for downward revisions to the FCC Form 499-A is important for the stability and administration of the funds covered by such form." *In the Matter of Universal Service Contribution Methodology Request for Review of a Decision of the Universal Service Administrator by IP Telecom Group, Inc.*, WC Docket No. 06-122, Order, DA 11-1371, ¶ 7 (2011).

²⁶ See 47 C.F.R. § 0.406; accord *In the Matter of Universal Service Contribution Methodology Request for Review of a Decision of the Universal Service Administrator by Manitowoc Public Utilities*, WC Docket No. 06-122, Order, DA 11-566, 26 FCC Rcd 4925, 4926, ¶ 4 (2011) (reiterating that businesses associated with the Commission are required to familiarize themselves with the rules and regulations that are relevant to their business); see also, 47 C.F.R. § 0.406.

²⁷ *In the Matter of Universal Service Contribution Methodology Request for Review of Decision of the Universal Service Administrator by Clear World Communications Corporation*, WC Docket No. 06-122, Order, DA 11-752, 26 FCC Rcd 6234, 6241-6242, ¶¶ 18-20 (2011).

FCC Form 499-A. Should USAC learn that UTEX “cannot or will not” refund the overcharges to its customers, USAC will be required to refer this matter to the FCC Enforcement Bureau for further review.²⁸

Federal Universal Service Pass-Through Charges from UTEX’s Underlying Carriers

With regard to the pass-through amounts UTEX states it will be assessed by its underlying carriers, consistent with the FCC’s Form 499-Q instructions, it is USAC procedure only to show filers with current universal service contribution obligations as contributors on the FCC website.²⁹ The FCC has established a reseller certification procedure, however, that will allow UTEX to certify to its underlying carriers that all of its revenues result from other carriers that are themselves direct contributors to the universal service support mechanisms.³⁰ Whether UTEX meets the certification standards set forth by the FCC to its underlying carriers’ satisfaction and if and/or how federal universal service contribution costs will be assessed by the underlying carriers is a matter to be determined by UTEX and its underlying carriers. USAC is not permitted to involve itself in private contractual disputes between carriers.³¹ Therefore, USAC dismisses as moot this portion of UTEX’s appeal.

If you wish to appeal this decision, you may file an appeal pursuant to the requirements of 47 C.F.R. Part 54, Subpart I. Detailed instructions for filing appeals are available at:

<http://www.universalservice.org/fund-administration/contributors/file-appeal>

Sincerely,

USAC

cc: Mr. Richard Lewis (via certified mail)

²⁸ *Id.* at ¶ 20.

²⁹ Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-Q, at 13 (Feb. 2008 version) (explaining that “[f]ilers may use the [FCC] website to verify the continuing validity of a reseller’s certification, and may presume that any reseller identified as a contributor [on the] website in the month prior to an FCC Form 499-Q filing will be a contributor for the coming quarter, and that it was a contributor for all prior quarters during that calendar year”); *accord* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-Q, at 13 (Feb. 2007 version).

³⁰ *Instructions* at 19.

³¹ See *In the Matter of Federal-State Joint Board on Universal Service American Telecommunications Systems, Inc. et al.*, CC Docket No. 96-45, Order, DA 07-1306, 22 FCC Rcd 5009, 5013, ¶ 14 (2007); *In the Matter of Weblink Wireless, Inc.*, Petition for Reconsideration, DA 01-1143, 17 FCC Rcd 24642, 24647, ¶ 13 (2002).

EXHIBIT 2

1
2
3
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Request for Review by UTEX
Communications Corp. d/b/a
FeatureGroup IP (Filer ID 825102) of
Decision of Universal Service
Administrator

§
§
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§
§
§

WC Docket No. 06-122

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6
DECLARATION OF RICHARD LEWIS IN SUPPORT OF UTEX COMMUNICATIONS
CORP. d/b/a FEATUREGROUP IP REQUEST FOR REVIEW OF USAC
ADMINISTRATOR DECISION

7
8
9
STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

10 My name is Richard Lewis. I am the Chief Financial Officer of UTEX Communications
11 Corp. d/b/a FeatureGroup IP ("FeatureGroup IP"). I have overseen the reporting and remitting
12 activities related to the federal USF program. I am also responsible for creating the Monthly
13 Operating Reports that are required in our bankruptcy case.

14 I offer the following Declaration to support the factual allegations in the Request for
15 Review and to authenticate certain documents.

16
Affidavit Support required by § 54.721(b)(2)

17
Description of FeatureGroup IP.

18 FeatureGroup IP is a Competitive Local Exchange Carrier and was formed to facilitate
19 interoperation between new technology communications systems that use the Internet Protocol
20 and the legacy public switched network. FeatureGroup IP uses its unique technical expertise and
21 advanced networking equipment to bridge the old and the new. The purpose was to exclusively
22 provide "telephone exchange service" as defined in §153(47) to non-carrier
23 enhanced/information service providers. FeatureGroup IP had no interest in providing

1 originating or terminating exchange access to IXCs or even recovering reciprocal compensation
2 for the transport and termination it provided when LECs or CMRS providers delivered traffic to
3 FeatureGroup IP for further delivery to FeatureGroup IP's end user ESP customers. The business
4 plan was to derive 100% of revenues from FeatureGroup IP's end user customers – and no
5 revenues from other carriers (along with no intercarrier compensation expense to other carriers)
6 – just like the Commission said it wanted in 2001.

7 UTEX proceeded to implement its business plan, but soon faced extraordinary litigation
8 problems due to an inability to secure a replacement interconnection agreement through § 252
9 processes. Meanwhile, FeatureGroup IP has been forced to deal with an antiquated agreement
10 dating back to 1998.

11 AT&T sent FeatureGroup IP large exchange access bills for the traffic to and from
12 FeatureGroup IP's end user ESP customers. AT&T asserted that the traffic handled by
13 FeatureGroup IP's ESP customers had in fact been originated on the PSTN and were misrouted
14 over local trunks. AT&T claimed the presence of phone numbers in signaling evidenced that the
15 traffic originated on the PSTN. In Docket 33323 (a post-ICA dispute resolution proceeding), the
16 Texas PUC's appointed arbitrator issued an "Award" on June 1, 2009 that agreed with AT&T's
17 contentions that access was due, based on a finding that the traffic was *not* "end user traffic" but
18 was instead "really" traffic from other carriers that was subject to exchange access. The resulting
19 millions of dollars amount held to be due to AT&T, along with AT&T's expressly-stated
20 intentions to cancel the then-existing agreement (while still holding up development of a
21 replacement agreement), forced FeatureGroup IP to file for bankruptcy protection on March 3,
22 2010.

History with USAC.

At the time of the Texas Arbitrator's Award FeatureGroup IP had filed 499As for the 2004, 2005, 2006, 2007 and 2008 calendar years.¹ In each of those reports FeatureGroup IP treated the revenue it had received from its customers as jurisdictionally interstate "end user telecommunications revenue" subject to assessment. The state arbitrator, however, functionally reclassified FeatureGroup IP's service from a jurisdictionally interstate "telephone exchange service" provided to end users to a jurisdictionally mixed quasi-exchange access service provided to other carriers. This state-level reclassification necessarily meant that the revenue was not assessable to the extent the "carriers" were contributors – which they were. As a result, FeatureGroup IP should not have paid the assessments and deserves a refund for all assessments paid for each of those years.

Soon after the Texas Award – on July 6, 2009 – FeatureGroup IP filed a revised 2009 499A (for the 2008 calendar year) to reflect the reclassification. FeatureGroup IP also attempted to submit revised reports for 2005 (2006 499A), 2006 (2007 499A) and 2007 (2008 499A), but USAC indicated it would refuse them, citing to a "policy" limiting revisions to one year. This policy was applied even though it is uncontested that FeatureGroup IP could not possibly have known that its classification of revenues as "end user" and therefore assessable for the 2005-2007 calendar years was "wrong." The state Arbitrator did not find that the service was "really" to other carriers until June of 2009.

USAC initially accepted the revised 2009 499A, and issued a credit. Around August 11, 2009, however, "USAC" (using the email address "Form499") apparently sent an email addressed to me. The message said:

¹ FeatureGroup IP's 2004 calendar year revenues as reported in the 2005 499A were de minimus, but we exceeded the threshold for calendar year 2005 (2006 499A) under the revenue classification we were then using.

From: Form499
Sent: Tuesday, August 11, 2009 11:44 AM
To: 'rlewis@worldcall.net'
Subject: ISSUE 2009 FCC Form 499-A - 825102

Dear Richard:

Thank you for filing the 2009 FCC Form 499-A for filer 825102 - UTEX Communications Corp. USAC has reviewed and compared your 2009 FCC 499-A form to your company's previously filed 2009 499-A and 499-Q filings and has found the following issue(s).

•Carrier's Carrier vs. End User Revenues - Please explain the large shift of revenues between Carrier's Carrier revenues reported in block 3 and End user revenues reported in block 4 from your previously filed 2009 499A to your current 499A.

Please note that in order to report revenues in block 3 your customer must be 1) incorporating your telecommunications services into its own telecommunications offerings; and 2) contributing directly to federal universal service support mechanisms (or you have a current certification from your customer stating that all their customers are direct contributors to federal universal service support mechanisms). All other telecommunication revenues are considered Enduser and must be reported in block 4.

•The Federal USF reported on line 403, columns (d) + (e) way exceeds the Federal USF allowed by the FCC based on the interstate and international revenue reported on line 420 columns (d) + (e). Please explain the large amount of

Federal USF reported on line 403 columns (d) + (e) as it compares to line 420 (d) + (e).

Please Note: Telecommunications carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark up above the relevant contribution factor.

•Line 406 - Please verify the amount of interstate and international revenues reported on line 406.

Please Note: The jurisdictional nature of a private line or WATS line is based on traffic not the physical A and Z locations of the circuit. The 499-A instructions state that if over 10% of the traffic carried over a private line or WATS line is interstate, then the revenue and costs generated by the entire line are classified as interstate.

A response to the issue(s) presented above is required within one week of receiving this email. You may respond directly to this email or contact USAC customer service at 888-641-8722 option 2, option 1. FCC Form 499-A worksheet instructions can be found on USAC's website at www.universalservice.org/fund-administration/forms. Thank you.

Hope you are having a great day.

Sincerely,

USAC

1 This email, however, did not come to my attention; the specific wording of the address
2 and subject line caused my email client to treat the message as spam. It never arrived in the
3 inbox but was instead placed in the SPAM folder. I was unaware that USAC had questions until
4 many months later in approximately June, 2010. We scheduled and then conducted a conference
5 call on June 4, 2010. I and our bankruptcy counsel participated in the call with several USAC
6 representatives. During that conference call, I fully explained the reasons and basis for the
7 revised 2009 499A. I also told the USAC representatives how to obtain the Texas PUC Award
8 that caused us to file the revision.

9 Four days after the conference call, Mr. Lawrence from USAC sent the following
10 message to me and our bankruptcy counsel:

11 **From:** Michael Lawrence [mailto:mlawrence@usac.org]
12 **Sent:** Tuesday, June 08, 2010 9:02 AM
13 **To:** martinec@mwvmlaw.com; rich@worldcall.net
14 **Cc:** David Capozzi; Stefani Watterson; Michelle Garber; David Ziebarth
15 **Subject:** FW: UTEX - ISSUE 2009 FCC Form 499-A – 825102

16
17 Dear Joe and Rich,

18 USAC is still waiting for a response to the inquiry below, regarding certain revenue reported on UTEX
19 Communications Corp.'s 2009 Form 499-A revision. USAC requests that the company address these issues
20 and respond to USAC within two weeks of this notice to substantiate the revenue reported. To further
21 substantiate the revenue reported as carrier's carrier in Block 3, USAC also requests a list of the
22 company's resellers, including the company names and Filer IDs.

23 Although the original email allows response either through email or through a phone call, USAC now
24 requests the response only through email for documentation purposes. If you have questions regarding
25 this inquiry please contact me in that manner.

26 Regards,

27 **Mike Lawrence**
28 Collections Manager
29 Universal Service Administrative Company
30 202-772-5249

31 Given that there had been a call on this topic only 4 days earlier, we took this message as
32 a follow-up request that the information orally conveyed on June 4 be put in writing. Mr.

1 Martinec (FeatureGroup IP's bankruptcy counsel) followed up with the June 26 email recounted
2 on page 2 of Exhibit 3. Soon thereafter, however, FeatureGroup IP and AT&T became consumed
3 in litigation in the bankruptcy case and the replacement agreement arbitration also required
4 considerable attention for a number of months. FeatureGroup IP has limited resources and could
5 not provide the written follow-up restating the information that had been orally provided on June
6 4.

7 **FeatureGroup IP bankruptcy filing as it relates to USAC.**

8 The millions of dollars amount found to be due to AT&T, along with AT&T's expressly-
9 stated intentions to cancel the then-existing agreement (while still holding up development of a
10 replacement agreement), forced FeatureGroup IP to file for bankruptcy protection on March 3,
11 2010. The case is styled *In re: UTEX Communications Corp.*, Debtor., Case No. 10-10599-CAG,
12 in the United States Bankruptcy Court, Western District of Texas, Austin Division. On May 13,
13 2010 USAC filed two separate claims. *See* Exhibit 4. Those claims were consistent with USAC's
14 prior acceptance of the revised 2009 499A.

15 As noted earlier, USAC and FeatureGroup IP had a conference call less than a month
16 after USAC's proof of claim, on June 4, 2010. There was then a period of silence until April 8,
17 2011. USAC Director of Operations Michele Garber sent a letter tentatively rejecting the revised
18 filing. She indicated that FeatureGroup IP could provide the promised information in writing
19 within 30 days and they would consider that information. She also provided as an alternative that
20 FeatureGroup IP could let the matter become a formal decision and appeal to higher levels
21 within USAC or to the FCC within 60 days. *See* Exhibit 3, page 3.

22 FeatureGroup IP responded within 30 days by letter dated April 27, 2011. *See* Exhibit 5.
23 FeatureGroup IP chose the first option of working with Ms. Gerber to persuade her to not

1 “reject” the revised form. The April 27, 2011 letter once again – this time in writing – explained
2 the rationale and basis for the restatement I orally conveyed on June 4, 2010.

3 **USAC practices on credits; impact on pre-petition and post-petition delineation and**
4 **accounting.**

5 The practice at USAC when a contributor submits a revised 499A that shows reduced
6 assessable revenues and thus lowers the contribution obligation for the applicable year is to issue
7 a “credit” rather than a refund. The “credit” is then amortized against obligations for future
8 periods until depleted. This may be acceptable in the normal course, but it presents problems
9 when the carrier is in bankruptcy and must carefully segregate pre-petition obligations and rights
10 to payment and any post-petition obligations and rights to payment. It has certainly caused
11 accounting issues in our case.

12 I believe that the “credit” balance resulting from the Decision relates to “pre-petition.”
13 USAC apparently agrees in principle, but their accounting does not fully implement this status.
14 Further, the current balance being billed by USAC and claimed as “post petition” administrative
15 claims is purely related to “interest” and “penalty” for non-payment both pre-petition and post-
16 petition USC contribution amounts originally billed by USAC but have now been removed.

17 According to USAC’s calculation of the credit due from the now-accepted revised 2009
18 499A is \$104,023.11. *See* Decision page 4; Exhibit 3 page 2.² This credit was carried forward for
19 each subsequent reporting period. Indeed, the credit grew larger in subsequent periods because
20 FeatureGroup IP had no contribution obligation for the 2009 calendar year or the first month of
21 the 2010 calendar year, to the point that the credit balance as of the date of the bankruptcy
22 petition was \$131,995.57 according to USAC. *Id.*

² By using the figures stated in the tentative rejection and in the Decision, I am not necessarily agreeing with the calculations. There are certain aspects of that calculation we simply cannot understand. The use of USAC’s figures here is merely to maintain consistency of discussion.

USAC's calculation of the effect of a rejection of the revised 2009 499A, however, was a reversal of the credit balance as of bankruptcy filing date by \$104,840.02³ – from \$131,995.57 to \$27,155.55.⁴ USAC decided that FeatureGroup IP would actually *owe* an additional \$816.91 for 2008 revenues as reflected on the original 499A. *Id.* Although the \$816.91 (assuming it has some basis) is clearly related to 2008 and therefore pre-petition, USAC would have attributed this \$816.91 to the second quarter of 2011⁵ – which is clearly post-petition.

As indicated on page 4 of the Decision, USAC invoiced this \$816.91 “in three equal installments over the second quarter of 2011.” *See* Exhibit 8 (April, May and June 2011 invoices). USAC therefore originally intended to move pre-petition obligations over to the post-petition period. I do not believe this approach is proper from a bankruptcy accounting perspective. This contemplated action was why FeatureGroup IP claimed in its April 27, 2011 letter (Exhibit 5) that if USAC formalized its tentative result it would violate the automatic stay. Fortunately, USAC has now apparently recognized this problem and its November 22, 2011 reconciliation (Exhibit 9) completes the reversal of the original \$816.91 and the associated accumulated interest they had been charging post-petition.

Penalties and interest charges.

On November 22, 2011 USAC sent FeatureGroup IP its invoice that purports to reflect the reconciliation of the Decision to prior billings. *See* Exhibit 9. The calculation backs out the

³ Notice that the reversal would have been \$104,804.02 rather than the original \$104,023.11. The difference is the \$816.91 mentioned in the same paragraph of the Decision.

⁴ USAC's credit balance does not reflect the fact that the invoices for January 2010 and February 2010 (as well as a small pro-rated portion of the March 2010), contained assessments which have not been removed by USAC even though we were below the de minimus threshold for those periods. While this admittedly does not relate to the effects of the revised 2009 499A, FeatureGroup IP is entitled to additional pre-petition credits that USAC has yet to provide.

⁵ “This resulted in USAC reversing the \$104,023.11 in credits that were issued based on UTEX's revised 2009 FCC Form 499-A and invoicing UTEX for the additional \$816.91 in universal service obligations owed in three installments over the second quarter of 2011.” (emphasis added)

aforementioned \$816.91 and \$104,023.11, leaving an “outstanding balance” of \$600.91 (the sum of \$594.49 claimed to be the “previous balance” from the prior month, and then \$6.42 in interest on the \$549.49. The problem, however, is that the \$594.49 is merely the accumulated interest and penalties over all post-petition months for assessment amounts USAC has now backed out and has ultimately agreed are not due, either pre- or post-petition. In other words, none of the entire amount (\$600.91) USAC says is presently due has anything to do with any valid USF obligation, and is entirely interest on or a penalty for nonpayment of a “principal” that we now know never existed. Further, some of the accumulated interest and penalties are actually related to pre-petition assessment amounts that the Decision now admits were never due.

We have prepared the following chart that shows the penalty and interest amounts billed by USAC on a post-petition basis through the November 22, 2011 reconciliation invoice (Exhibit 9):

<u>Invoice Month</u>	<u>Penalty and Interest Charged</u>	<u>Running Balance</u>
9/10	\$34.17	\$34.17
10/10	\$31.06	\$65.23
11/10	\$118.61	\$183.84
12/10	\$58.66	\$242.50
1/11	\$58.66	\$301.16
2/11	\$62.57	\$363.73
3/11	\$54.75	\$418.48
4/11	\$60.62	\$479.10
5/11	\$0.00	\$479.10
6/11	\$63.00	\$542.10
7/11	\$31.03	\$573.13
8/11	\$5.24	\$578.37
9/11	\$7.54	\$585.91
10/11	\$8.58	\$594.49
11/11	\$6.42	\$600.91

The sum of penalty and interest charges USAC has charged during the post-petition period precisely matches the claimed current balance. This tells me that 100% of the amount USAC claims is due on a post-petition basis is nothing but “interest” and “penalties” from pre-

petition (assuming the March 2010 invoice was properly pro-rated as of the March 3, 2010 bankruptcy filing date) and post-petition “contribution” amounts that were later reversed.

My understanding of the bankruptcy process is that it requires that the debtor and all creditors establish a clear line of demarcation between pre-petition obligations and rights to payment and any post-petition obligations and rights to payment. I believe the Decision does not correctly implement required accounting and separation because issues and amounts (specifically interest and penalties) related to now-vacated pre-petition obligations are incorrectly attributed to post-petition issues and amounts and apparently treated as administrative claims as if they were actually post-petition.

USAC did send invoices for claimed post-petition contribution amounts. This can be seen by reviewing USAC’s May 21, 2010 invoice (Exhibit 10). This is the invoice that attempted to implement the removal of pre-petition obligations. After USAC’s calculation of the “Bankruptcy A/R Adjustment,” a “Current Balance” of \$4,174.43 was reflected on this invoice. We take this to represent amounts USAC was then claiming were “post-petition.” The June 22, 2010 invoice (Exhibit 11) claimed an additional \$1,423.93 was due “post-petition” for a total of \$5,598.36. USAC billed penalties and interest on these amounts for many months. However, USAC’s July 22, 2011 invoice (Exhibit 12) reversed the \$5,598.36 by issuing a credit in that exact amount. They did not, however, credit the accumulated interest. As far as I can tell the \$573.13 shown as the remaining balance is entirely interest and penalties. USAC’s invoices after July 2011 carried forward this \$573.13 and added interest and penalties. The accumulation sums to the \$594.49 claimed as “Previous Balance” in the November 22, 2011 invoice (Exhibit 9). That invoice then (after attempting to reconcile the acceptance of the revised 2009 499A) adds \$6.42 in additional interest, with the result that USAC now says FeatureGroup IP owes the USF \$600.91 on a post-

petition basis. The problem is this amount is entirely composed of interest and penalties accruing over time on assessment amounts that were billed but then later reversed.

FeatureGroup IP credit should be paid to the bankruptcy estate so the funds can be distributed as part of the reorganization plan.

USAC now agrees that FeatureGroup IP is entitled to a credit of \$104,840.04.⁶ The Order Lifting Stay states that FeatureGroup IP's net credit for pre-petition amounts "shall be the property of the bankruptcy estate." Given that the pre-petition credit cannot be intermingled with any post-petition obligations (which are zero in any event after the interest and penalties are removed), I believe that the only proper recourse is for USAC to tender payment to FeatureGroup IP so that these funds may truly be "property of the estate" and used to defray obligations to other creditors or as directed by the bankruptcy court.

FeatureGroup IP also contends that it cannot be required to refund any amount to any of its customers until it gets back the credit in cash. USAC is presently holding the money it has simultaneously instructed FeatureGroup IP to refund. FeatureGroup IP cannot be required to refund amounts to its customers that were paid in to the fund and have yet to be returned. USAC has the money it has told FeatureGroup IP to refund. When we receive the pre-petition credit in cash we will then recognize the pre-petition liability as part of our reorganization plan. If we do not receive the credit it cannot truly be "property of the estate."

FeatureGroup IP should be allowed to submit revised 2006, 2007 and 2008 499As

The Decision recognizes that we had good reasons to revise the original 2009 499A. We classified our revenues in the same fashion in our 2005,⁷ 2006, 2007 and 2008 499As. Thus, but

⁶ This is the sum of credits acknowledged in USAC's November 22, 2011 invoice on page 3 (Exhibit 9).

⁷ As noted earlier, the 2005 499A (representing 2004 calendar year revenues) showed that we were de minimus. While we could technically request the right to revise the form for that year it would not make any difference.

1 for the One Year Filing Deadline we would be able to submit revised 499As for those years as
2 well and secure additional credits. On Decision page 6, the Decision held that “USAC is
3 prohibited from accepting a downward revision of an FCC Form 499-A after the FCC-mandated
4 one-year deadline.”

5 In FeatureGroup IP’s case, the original reports were based on our good faith and honest
6 attempt to classify revenues; indeed the original classification was one that led to a large
7 contribution burden. But it was not until June of 2009 that the state Arbitrator held that these
8 were not in fact end user revenues and were instead carrier’s carrier revenues. By then, the one
9 year deadline had long passed for the 2006, 2007 and 2008 499As. I do not believe FeatureGroup
10 IP can reasonably be charged with any form of negligence or lack of diligence. We did not
11 “discover” the erroneous revenue classification until the state Arbitrator ruled. When the Texas
12 Award was released, my staff acted quite promptly to submit revised reports.

13 FeatureGroup IP has the duty to pursue all avenues to recover property and funds to
14 which it is entitled, and we are entitled to additional refunds for the 2005 (2006 499A), 2006
15 (2007 499A), 2007 (2008 499A) calendar years. We should have the right to submit revised form
16 for those years and collect the refund so that the amounts can be used and disposed in the
17 reorganization.

18 **Further revised 2009 499A for 2008 revenues.**

19 The Decision on pages 6-7 requires FeatureGroup IP to provide refunds to its customers
20 that paid USF passthrough surcharges in 2009. FeatureGroup IP does not mind doing so, but this
21 must occur in the bankruptcy process, since this is a pre-petition obligation and, equally
22 important, we must receive our credit in cash before we pay any refund. The Decision
23 acknowledges that disbursement of these refunds would normally require a further revision – a

1 “downward adjustment to Line 403 of the form.” The Decision, however, says a further revised
2 499A will not be allowed because of the One-Year Filing Deadline.

3 Revenue from customers that pay USF passthroughs is part of the USF assessment base
4 and carriers must pay the USF assessment on that revenue. The \$119,594⁸ received from
5 customers in 2008 and that were reflected in the revised 2009 499A comes from a passthrough.
6 The refusal to allow submission of a revised form means that UTEX will not be able to recover
7 the approximate \$13,000 in additional assessment that was levied on that revenue which the
8 Decision has ordered to be refunded, based purely on the fact that the Decision was rendered
9 more than a year since the 2009 499As were filed.

10 **Refunds of USF surcharges received from customers.**

11 FeatureGroup IP acknowledges the refund obligation. This is, however, complicated by
12 the fact of FeatureGroup IP’s bankruptcy: this will be a pre-petition obligation. If the Decision
13 contemplates that FeatureGroup IP must immediately sit down and write checks outside of the
14 bankruptcy process, I believe the command would violate bankruptcy principles. Instead, I
15 believe that this obligation must be handled as part of any reorganization plan, and treatment
16 according to the bankruptcy laws and rules. Further, as noted until we get the credit amount in
17 cash so it can be used as property of the estate there is nothing to refund. USAC still has the
18 money it has ordered us to refund. Therefore any refund obligation must be conditioned on
19 USAC’s remittance of the credit amount to FeatureGroup IP.

20 Absent specific direction from the Commission my staff will handle this obligation
21 within the context of our reorganization and treat the amount as a debt along with all other pre-

⁸ See Decision page 3 (reflecting passthrough revenue reported in revised 2009 499A).

petition obligations. We cannot and therefore will not provide any refunds until we first receive the credit in cash from USAC.

Time value of money held by USAC is a “contribution.”

USAC has been holding FeatureGroup IP’s property – an amount somewhere close to \$104,840 – since 2009. FeatureGroup IP has been denied the use of those funds. FeatureGroup IP has not earned interest on those funds, so FeatureGroup IP has suffered at minimum by the time value of those funds between July 6, 2009 and the present. This situation will continue for so long as USAC is withholding FeatureGroup IP’s funds. The USF has enjoyed the benefit of retention of the funds and will continue to do so until they are returned. I believe this is a “contribution” and should have been recognized as such. Yet FeatureGroup IP has been listed on the 499 Filer Database as a “non-contributor” for much of this same period. *See* <http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825102>.

Like most carriers, FeatureGroup IP must procure services from other FCC Filer entities in order to run its business. Those providers are required by the rules to check the 499 Filer Database to determine whether FeatureGroup IP is a contributor. Since FeatureGroup IP is not listed as a contributor these entities must treat FeatureGroup IP’s revenues as “end user” revenues, and pay an assessment on them. They then naturally seek to pass that cost through to FeatureGroup IP. We have faced this situation with several of our vendors.

FeatureGroup IP explained this problem to the Administrator by using a specific example (Exhibit 5, pages 4-5), but the issue was deemed “moot” on page 7 of the Decision. The present situation is that FeatureGroup IP is in fact contributing to the USF because of at least the time value of the retained amount, but is not being treated as a contributor. Then FeatureGroup IP’s vendors pay an assessment on the revenue received from FeatureGroup IP and pass it through.

FeatureGroup IP is therefore a “contributor” but its status as such is not being properly recognized, to the detriment of both FeatureGroup IP and its vendors.

I believe the proper way to remedy this problem is to instruct USAC to change FeatureGroup IP’s designation to that of “contributor”; rule that FeatureGroup IP has been a contributor for the entire period since 2009 and hold that (1) all FeatureGroup IP vendors may submit revised 499As for any period since 2009 that treats the revenue they received from FeatureGroup IP as “carriers’ carrier” rather than “end user” and recoup the assessment they paid and then (2) refund any passthrough amounts they recovered from FeatureGroup IP on account of its incorrectly deemed noncontributor status with the resulting incorrect classification of revenues as “end user.” This is the only result that will make all parties whole and prevent unjust enrichment by the USF though double recovery.

Document Authentication

Exhibit 1 to this Request for Review is a true and correct copy of the Administrator’s decision that is in issue.

Exhibit 2 to this Request for Review is this Declaration.

Exhibit 3 to this Request for Review is a true and correct copy of a Letter from USAC dated April 8, 2011.

Exhibit 4 to this Request for Review is a true and correct copy of USAC’s two Proofs of Claim that were filed by USAC in our bankruptcy proceeding on or about May 13, 2010.

Exhibit 5 to this Request for Review is a true and correct copy of FeatureGroup IP’s April 27, 2011 letter to USAC responding to their April 8, 2011 letter (Exhibit 3).

Exhibit 6 to this Request for Review is a true and correct copy of the Motion to Lift Stay filed by USAC in our bankruptcy proceeding.

Exhibit 7 to this Request for Review is a true and correct copy of the Stipulated Order lifting Stay.

Exhibit 8 to this Request for Review is a true and correct copy of USAC's invoices to FeatureGroup IP for April, May and June of 2010.

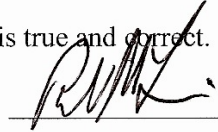
Exhibit 9 to this Request for Review is a true and correct copy of USAC's most recent invoice (November 22, 2011) to FeatureGroup IP that reflects USAC's attempt to perform the reconciliation promised in the Decision.

Exhibit 10 to this Request for Review is a true and correct copy of USAC's May 21, 2010 invoice to FeatureGroup IP.

Exhibit 11 to this Request for Review is a true and correct copy of USAC's June 22, 2010 invoice to FeatureGroup IP.

Exhibit 12 to this Request for Review is a true and correct copy of USAC's July 22, 2011 invoice to FeatureGroup IP.

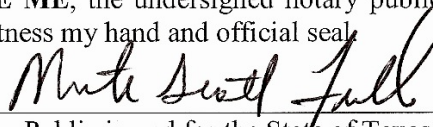
1 I declare under penalty of perjury that the forgoing is true and correct.

2 

3 Executed on December 19, 2011

Richard Lewis

4
5 **SUBSCRIBED AND SWORN BEFORE ME**, the undersigned notary public, on this
6 the 19th day of December, 2011, to certify with witness my hand and official seal

7 

8 Notary Public in and for the State of Texas

9
10 Commission Expiration: 11-15-14

